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In the Supreme Court of the United States

OCTOBER TERM, 1974

HARRY HONEYCUTT,

Plaintiff-Appellant,

vs.

AETNA INSURANCE COMPANY,

Defendant-Appellee.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1897

HARRY HONEYCUTT,

Plaintiff-Appellant,

vs.

AETNA INSURANCE COMPANY,

Defendant-Appellee.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

There are additional facts other than those stated by the petitioner with regard to search and seizure of evidence and testimony in items admitted in evidence to the jury. The Aetna Insurance Company hired the services of Daniel J. Leahy, an attorney, within two days after the fire of August 23, 1970. Mr. Leahy appeared at the fire scene on August 27, 1970, with Alva C. Todd, an engineer hired by Mr. Leahy on behalf of Aetna Insurance Company, to investigate the cause and origin of the loss. Mr. Honeycutt was at the scene upon their arrival, along with Police Chief Hummel of the Barrington Hills Police Department and Deputy Fire Marshal Schaefer. Mr. Honey-

cutt permitted everyone there to enter the house, permitted Mr. Todd to examine the premises and take certain samples from the various rooms in the house. The samples taken by Mr. Todd were examined by Mr. Todd, who is a chemist as well as an engineer. He testified on the trial that his examination showed that the piece of carpeting taken from the dining room contained kerosene vapors. He also testified that, in his opinion, this fire was caused by arson since there were many separate and unconnected fires.

On August 29, 1970, Mr. Leahy returned to the fire scene with a photographer hired by him on behalf of Aetna Insurance Company and found no one present. In fact, Mr. Honeycutt was elsewhere on his 9.8 acres doing some work on a tractor. Mr. Leahy and the photographer entered the premises by removing boards that were in place of the front door and the photographer took some pictures. Mr. Honeycutt was not living in the house at this time because of the fire damage. Mr. Honeycutt returned to the premises and saw two cars in his driveway. Mr. Leahy came out of the front of the house and told Mr. Honeycutt that he had called at the back door and received no response and then went around to the front door and removed the wood panels and had the photographer take some pictures. Mr. Honeycutt had a conversation with Mr. Leahy at the front door of the house but made no objection to the presence of Mr. Leahy or the photographer and no objection to the taking of pictures. Some of the photographs taken by this photographer were allowed in evidence in the trial of the cause.

There was no allegation made either at the trial level or in the Court of Appeals that Mr. Leahy, Mr. Todd or the photographer hired by Aetna Insurance Company were working in collusion with the governmental authorities in

the investigation of this matter. The testimony by the governmental authorities regarding their search and seizure, the chemist who examined samples taken by the governmental authorities, and the photographs taken by the governmental authorities put in evidence, were cumulative to the testimony of Dr. Todd, the evidence gathered by Dr. Todd, and the photographs taken on behalf of the Aetna Insurance Company, which were put in evidence.

ARGUMENT I

THE OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS CORRECT.

The opinion rendered by Chief Judge Swygert and Judge Cummings of the Seventh Circuit Court of Appeals and Judge Rieves of the Fifth Circuit Court of Appeals, sitting by designation, was correct in law. The court's opinion relied upon the case of the *United States* v. *Calandra*, 414 U.S. 338 (1974). The United States Supreme Court stated as follows:

> In the instant case, the Court of Appeals held that the exclusionary rule of the Fourth Amendment limits the grand jury's power to compel a witness to answer questions based on evidence obtained from a prior unlawful search and seizure. The exclusionary rule was adopted to effectuate the Fourth Amendment right of all persons 'to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . . .' Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. . . .

The United States Supreme Court made it clear in that quotation that from the *Calandra* case it was following a series of Federal Court decisions holding that the exclusionary rule of the Fourth Amendment would be applied in criminal proceedings or quasi-criminal proceedings only.

Evidence seized in violation of Fourth Amendment rights have been held admissible in other circumstances as follows: in grand jury proceedings, *United States* v. *Blue*, 384 U.S. 251 (1966); in sentencing hearings after the de-

fendant has been convicted, *United States* v. *Schipani*, 435 F. 2d 26 (2d Cir. 1970), cert. den. 401 U.S. 983; in parole hearings, *United States* v. *Fitzpatrick*, 426 F. 2d 1161 (2d Cir. 1970); in National Labor Relations Board Hearings, *NLRB* v. *South Dade Daily Press*, 415 F. 2d 360 (9th Cir. 1969), cert. den. 379 U.S. 915; and in a contempt of Congress case, *United States* v. *McSurely*, 473 F. 2d 1178 (1972).

These cases are distinguished from *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965). This was an action by the State of Pennsylvania to forfeit an owner's title to an automobile in which he had been apprehended transporting untaxed liquor into Pennsylvania. The United States Supreme Court held that the exclusionary rule to the Fourth Amendment did apply to such a hearing, but on the grounds that the hearing was of a quasi-criminal nature. The Court stated on page 700 of the U. S. Reports as follows:

> Finally, as Mr. Justice Bradley aptly pointed out in *Boyd*, a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of offense against the law. In this case, McGonigle, the driver and owner of the automobile, was arrested and charged with a criminal offense against the Pennsylvania liquor laws. . . .

The case for which the petitioner applies for certiorari is neither criminal nor quasi-criminal in nature, but purely a civil case for money damages based on a contract of insurance.

The petitioner also cited *Terpstra* v. *Niagara Fire Insurance Company*, 226 N.Y. 2d 70, 256 N.E. 2d 536 (1970) as a basis for arguing that evidence seized in violation of the

Fourth Amendment privileges should not be admissible in a civil case. That case is easily distinguishable from the case at bar. The assured in that case claimed a prior confession, which was held inadmissible in a criminal arson case because of the failure to give the *Miranda* warning, was not admissible in a civil action against the fire insurance carrier for money damages. Plaintiff claimed that it was not admissible because his Fifth Amendment rights were breached. The court held that the Fifth Amendment rights could not be utilized in a civil action where the plaintiff was suing for money damages if he wished to proceed with his case. The court held that such a confession was admissible in a civil action if competent and relevant. The Fourth Amendment was named in the opinion merely to distinguish that the Fifth Amendment specifies criminal proceedings, whereas the Fourth Amendment does not.

ARGUMENT II

THE ISSUE INVOLVED IS NOT OF SUFFICIENT IMPORTANCE TO WARRANT THE COURT'S GRANTING THIS PETITION.

The fact that there are no reported state Appellate Court, Supreme Court, Federal Court of Appeals, or United States Supreme Court opinions clearly on the point of whether the exclusionary rule of the Fourth Amendment is applicable in civil cases is not, in itself, sufficient to make the decision of such question of such importance to render a hearing by the United States Supreme Court. On the contrary, the lack of any reported opinions shows that the question does not present itself in civil cases on enough instances to warrant discussion by courts of review prior to the *Honeycutt* case. Chances of this question arising in a civil case are extremely remote.

ARGUMENT III

A DECISION BY THIS COURT OF THE CONSTITUTIONAL QUESTION WOULD NOT BE DISPOSITIVE OF THE CASE.

In the event this Court would accept the petition for writ *of certiorari and reverse the Seventh Circuit Court of* Appeals, such reversal would not, in and of itself, dictate a new trial in the matter. Evidence was produced to the jury by individuals hired by the insurance carrier to investigate the fire. This evidence was of testimony of separate and unconnected origins of fire leading to the witnesses' opinion that it was an arson fire. Secondly, samples taken from the fire scene by an independent investigator, who was not part of a law enforcement agency, and testimony by the same witness who was a chemist that the samples contained traces of volatile liquids, added to his opinion that this was an arson fire. Thirdly, there was evidence produced by the insurance carrier in the form of photographs taken by a private photographer hired by the insurance carrier that further demonstrated to the jury that this was an arson fire.

A citizen's Fourth Amendment rights can only be abridged by a search and seizure by a governmental authority. *Burdeau* v. *McDowell*, 256 U.S. 465, 474, 41 S. Ct. 574, 65 L. Ed. 1048 (1921); *U. S.* v. *Vallen*, 479 F. 2d 467 (3rd Cir. 1973); *United States* v. *Echols*, 477 F. 2d 37 (8th Cir. 1973); *United States* v. *Harding*, 467 F. 2d 480 (10th Cir. 1973).

The testimony allowed into evidence, and testimony allowed into evidence from the governmental authorities, are the only evidence claimed to be in violation of the petitioner's Fourth Amendment constitutional rights and not the evidence obtained and produced for the jury by the inde-

pendent witnesses hired by the insurance carrier. The evidence produced by the governmental authorities was cumulative to that produced by the non-governmental witnesses, and any inadmissibility of the testimony in evidence produced by the governmental authorities would not of necessity mean that the petitioner would receive a new trial. At best, if this Court were to accept the petition for writ of certiorari and reverse the United States Court of Appeals, it would have to be sent back to the United States Court of Appeals for further decision of whether or not a new trial should be granted on the basis of the above stated reasons.

CONCLUSION

The Aetna Insurance Company, as Defendant-Appellee, prays this Honorable Court deny the petition for a writ of certiorari of the Plaintiff-Appellant.

Respectfully submitted,

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